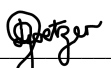




**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3)	REVISED.
<u>27.04.2022</u> DATE  SIGNATURE	

CASE NUMBER: 3128/2021

In the matter between:-

BRITS, DONOVAN

First Applicant

DB FLUID DYNAMIX (PTY) LTD

Second Applicant

and

AQS LIQUID TRANSFER (PTY) LTD

Respondent

In re:

AQS LIQUID TRANSFER (PTY) LTD

Applicant

and

BRITS, DONOVAN

First Respondent

DB FLUID DYNAMIX (PTY) LTD

Second Respondent

COETZEE, MARCO

Third Respondent

JUDGMENT – LEAVE TO APPEAL

GREYLING-COETZER AJ

- [1] The applicants were unsuccessful in warding off an urgent application by the respondent to declare that the first applicant, **DONOVAN BRITS** (herein after “Brits”) and the second applicant, **DB FLUID DYNAMIX (PTY) LTD** (hereinafter “DB Fluid”) are in contempt of court for their failure to comply with the order by Roelofse AJ under case number 2450/2021 granted, on 21 July 2021 (“the Roelofse order”).
- [2] Brits and DB Fluid were further interdicted in terms of Section 24 of the Copyright Act 98 of 1978 from using, distributing and/or publishing the Domin8r Pumps brochure directly or indirectly. The third respondent **MARCO COETZEE** (hereinafter “Coetzee”) was interdicted and restrained for the period 3 March 2021 to 3 March 2022 from either directly or indirectly selling, repairing or maintaining any pumps of AQS/MC customers specified in the Roelofse order.
- [3] This court held that Brits and DB Fluid acted in contempt of the Roelofse order and failed to discharge their evidentiary burden. It was also held that they made unlawful use of the AQS copyright protected brochure when utilizing it as the Domin8r Pump brochure. In respect of costs and in exercising a judicial discretion, it was held that the costs order, jointly and severally on an attorney-and-client scale ordered against Brits and DB Fluid, was justified in the circumstances.
- [4] Brits and DB Fluid (collectively “the applicants”) now apply for leave to appeal against the declaration of contempt, the interdict in terms of Section 24 of the Copyright Act 98 of 1978 and the costs order awarded against them. They seek leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of this Division. The application for leave to appeal was served and filed on 19

October 2022, shortly after the order was granted and simultaneously with a request for reasons. The application for leave to appeal was filed in terms of Rule 49(1)(b). Pursuant to the reasons being provided to all the parties, Brits and DB Fluid filed supplementary grounds for leave to appeal on 2 March 2022. The applicants supplemented grounds ostensibly also filed in terms of Rule 49(1)(b), but 31 court days after the reasons for the order was made available to the parties.

[5] The facts of this case are set out in the full reasons and need not be repeated herein.

[6] Section 17 of the Superior Courts Act 10 of 2013 regulates an application for leave to appeal from a Division of the High Court, and reads as follows:-

“17 LEAVE TO APPEAL

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b) The decisions sought on appeal does not fall within the ambit of Section 16(2)(a) and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[7] From a cursory reading of the notice of application for leave to appeal it appears that the applicants employed the old test (namely, that there is a reasonable prospect that another court may come to a different finding). The correct test was relied on in the applicants heads of argument. The standard

of reasonable prospects of success have been developed by our courts over time. It is now specifically set out as per paragraph 7 above.

[8] In the current form Section 17 provides that leave to appeal may be granted only where the judge is of the opinion that the appeal would have a reasonable prospect of success, or if there is some other compelling reason why the appeal should be heard. This is a more stringent approach than before, and so the bar to qualify for leave to appeal has been raised. The word “only” means that leave to appeal may be granted in the stated circumstances only. What this means practically is that a greater measure of certainty that a different outcome would be reached, is required.

[9] The court in **Mgezeni Gasbat Nxumalo v The National Bargaining Council for the Chemical Industry (NBCCI) and Others**¹ conveniently summarizes the approach to an application for leave to appeal, albeit in a labour law context, as follows:-

“The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. As the respondents observe, the use of the word ‘would’ in s 17(1)(a)(i) are indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another (75/2008) [2015] ZALCC 7 (28 July 2015)) Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (see the judgment by Davis, JA in Martin and East (Pty) Ltd v NUM (2014) 35 ILJ 2399 (LAC), and also Kruger v

¹ JR 1170/2013 (unreported)

S 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp, J in Oasys Innovation (Pty) Ltd v Henning and Another (C) 536/15 (6 November 2015) and also Seatlholo and Others v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union and Others²)”.

[10] In the application for leave to appeal the grounds were in summation that:-

- (a) the court erred in declaring Brits and DB Fluid to be in contempt, and should have found that all the evidence put forward by the respondent, **AQS LIQUID TRANSFER (PTY) LTD** (hereinafter “AQS”), was hearsay and that AQS failed to discharge the statutory *onus* with regard to the use of hearsay evidence;
- (b) the court erred in awarding a punitive cost order against the applicants jointly and severally, and should have dismissed the application and have awarded costs against AQS; and
- (c) the court erred in granting the interdict in terms of Section 24 of the Copyright Act 98 of 1978, and should have found that there was no evidence which connected the applicants to the Domin8r Pumps and/or that they had any interest in Domin8r Pumps and/or published the brochure complained of.

[11] The belated supplementary grounds for appeal, appears to have been served after service of the respondent’s heads of argument, amplified the grounds with some specificity. Therein it is *inter alia* relied on that:-

- (a) the court erred in finding that:-
 - (i) AQS was entitled to rely on hearsay evidence;
 - (ii) AQS complied with the requirements set out in Section 3(1)(c)

² 2016 37 ILJ 1485 (LC)

of the Law of Evidence Amendment Act 45 of 1988; and

- (iii) the hearsay evidence should accordingly be admitted in the interest of justice;
- (b) AQS failed to adequately explain its reliance on the hearsay evidence and had therefore not complied with the requirements of the Law of Evidence Amendment Act 45 of 1988;
- (c) the court erred in finding that the affidavit by the applicants were replete with bold denials, and that Brits did not deny that he does not compete with AQS;
- (d) the court erred in finding that there would have been no reason for Brits to exercise a change of directorship of the entities, and that his reasons for doing so are unconvincing; and
- (e) the court erred in finding that Brits attempted to conceal his involvement in activities and hid behind various entities, amongst others.

[12] It was argued on behalf of AQS that the notice of application for leave to appeal was fatally defective and the application should be struck from the roll. AQS contended that the initial application for leave to appeal contained only overly broadly stated grounds, which render, on the strength of matters such **Songono v Minister of Law and Order**³ and the authorities referenced therein, to be fatally defective for non-compliance with Rule 49(1)(b). In substantiation it was argued that the *mala fides* of Brits and DB Fluid is evident in the lapse of time since the application for leave to appeal was filed, as at expiry of the 15-day period provided for in Rule 49(1)(b) no supplementary grounds for appeal had been filed, nor had Brits and DB Fluid pressed to have this application heard at the earliest opportunity that the court could accommodate.

³ 1996 (4) SA 384 (E)

- [13] The aforesaid argument should be considered in light of the applicable factual position being that the applicants did supplement their grounds for appeal, however it was done after the lapse of the time period allowed therefor. I am not convinced that the matter should be struck from the roll. But it raises the question whether the belated supplementary grounds are before court, absent an application for condonation. The belated delivery of the supplementary grounds was not raised by the respondent. As such and absent a complaint of prejudice these supplementary grounds are considered.
- [14] It is contended on behalf of the applicants that the totality of the evidence against them were hearsay, and that AQS had failed to discharge its statutory *onus* with regard to the use of hearsay evidence and AQS failed to provide an adequate explanation for its reliance on the hearsay evidence. The applicant does not state in what respect the statutory onus was not discharged.
- [15] AQS dealt with the reasons why it sought admission of the hearsay evidence, which reasons were canvassed in the reasons for the order. They were considered and found to be sufficient. But this was not considered in a forlorn manner. The reasons were considered in conjunction with the statutory provisions of Section 3(1)(c) and on the strength of the decision of **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others** 2021 (11) BCLR 1263 (CC) par [20] to [23] (“Zuma Judgment”). There in it was held that hearsay evidence may be admitted into evidence in contempt proceedings (such as the application which was before court), provided that it meets the requirements of Section 3 of the Law of Evidence Amendment Act 45 of 1988.
- [16] In terms of Section 3(1)(c) a court has to have regard to:
- 16.1 the nature of the proceedings,
 - 16.2 the nature of the evidence,

- 16.3 the purpose of which the evidence is tendered,
- 16.4 the probative value of the evidence,
- 16.5 the reasons why the evidence is not given by the person upon whose credibility the probative value of such evidence depends,
- 16.6 any prejudice to a party which the admission of such evidence might entail and
- 16.7 any other factor which should, in the opinion of the court, be taken into account.

[17] Should the court having considered aforesaid be of the opinion that such evidence should be admitted in the interest of justice it shall be so admitted. In evaluating the evidence relied on by the respondent amplified by the fact that the matter was found brought and found to be urgent, I remain of the view that the hearsay evidence tendered ought to have been admitted in the interest of justice.

[18] It was argued on behalf of the applicants that despite the discretionary nature of the inquiry in respect of subsection (c), the factors therein are joined by the conjunctive “and”. But any decision which does not specifically take into account the 6 other factors set out in that subsection, will not constitute a proper application of its provisions.

[19] All of the above was present and considered before the finding that the hearsay evidence as tendered by AQS ought to be admitted. Neither of the applicants raised any real and material prejudice in respect of the hearsay evidence. Furthermore, the applicants had the opportunity to fully consider and answer thereto. The urgent application was served on both the applicants on 27 August 2021. The applicants filed their answering affidavit

approximately a month later.⁴ In addition, the applicants filed a further affidavit, wherein they enjoyed a further opportunity to raise prejudice if any and answer to the allegation they regard as hearsay. After careful consideration, I am not persuaded that this court exercised its discretion incorrectly when it admitted the hearsay evidence.

[20] The applicant bemoans the finding that the applicants' answering affidavit was replete with bold denials. The applicants have throughout their answering affidavit utilized the phrase that "*the contents hereof are denied for those reasons stated in this answering affidavit*". This phrase has been employed to answer to various individual and grouped material factual allegations as alleged by AQS. It was argued by the applicants that such a statement is enough to answer to specific allegations. I cannot agree with this contention. As much as it has become customary to utilize cross-referencing or referrals, where same is done, it has to be done with specificity and be preceded by a statement of the material facts a respondent relies on in answer to the applicant's allegations.

[21] For example, in answer to the allegations by AQS that Brits has made an identical copy of AQS' brochure by substituting the name with the name Domin8r Pumps. That AQS came into possession of said brochure from Barberton Mines, which is a customer with whom Brits and DB Fluid dealt with on AQS' behalf prior to the termination of the agreement between the parties. That Barberton Mine received the Domin8r Pump brochure from Brits. To this the applicant's answered that "(t)he contents hereof are denied for those reasons stated in this answering affidavit." Further that there is no reference to Brits and/or the DB Fluid on the brochure. There would be no reason for DB Fluid and/or Brits to produce any brochure, as Brits and/or DB Fluid does not trade in such products.

[22] Aforementioned leaves the court to guess what portion of the answering

⁴ The exact date of filing being unknown, as no filing sheet forms part of the records. However, although the answering affidavit was not dated, the commissioner of oath's stamp indicates it to have been deposed to on 20 September 2021.

affidavit should be considered in as answer to the various factual allegations made by AQS. Even scrutinizing the introductory paragraphs (where you would ordinarily expect the version of a respondent such as the applicants' version to be set out) preceding the *ad seriatim* response do not deal with these allegations.

[23] On Brits' own version, he was a director of a company which holds the trademark for Domin8r Pumps, which directorship he divested himself of shortly after the Roelofse order, and which is hence forth ostensibly run by his father. Considering this the allegations highlighted above were to be dealt with fully and frankly in order to be regarded as seriously disputed. Absent this, it is a bold denial. It was inter alia expected of the applicants to explain how Barberton Mine could come to be in possession of a pump brochure displaying the name and trademark of Domin8r pumps, a trademark belonging to a company wherein Brits was a director till after the Roelofse order and which is now run by his father.

[24] Aforementioned is but one of the examples of the bare denials employed by the applicants. I am not persuaded that another court would come to a different conclusion.

[25] It is also contended on behalf of the applicants that this court erred in interdicting the applicants in terms of Section 24 of the Copyright Act 98 of 1978, as there was no evidence linking the applicants to the Domin8r Brochure. The documentary evidence showed that the brochures of Domin8r Pumps and AQS were identical. A copy of the Domin8r brochure was provided to AQS by its customer (Barberton Mines). It was alleged and admitted by Brits that he registered a domain with the name "*D Pumps*", but failed to answer to the allegation that D Pumps stands for Domin8r Pumps.

[26] It is common cause that Domin8r was a registered trademark which is owned by Amanzi Solutions. Amanzi Solutions is one of the companies from which Brits resigned as director shortly after the granting of the Roelofse order. Brits was replaced as director of Amanzi Solutions by his elderly father. So too,

Paul Maritz is a director of Amanzi Solutions, who owns the Domin8r registered trademark (on Brits' version). Notwithstanding Brits merely denies that Paul Maritz has any connection to either of the applicants and only requested DB Fluid to store items for him.

[27] On a conspectus of the evidence, the applicants are sufficiently linked to Domin8r Pumps. I am unpersuaded that an appeal on this ground would have a reasonable prospect of success.

[28] The cost order as made against Brits and DB Fluid is that of attorney-and-client. This cost order was made on the strength of the judicial discretion, and relying upon the principles laid down in the **Zuma** judgment (*supra*). Absent any specific indication as to how and to which extent such discretion was not judicially exercised.

[29] An award of costs is in the discretion of the court, and such discretion, as we all know, has to be exercised judicially.⁵ It is further a trite principle that costs follow the event.⁶

[30] It **Hotz and Others v University of Cape Town**⁷ it was stated by the Constitutional Court that where an appeal court considers interfering with a cost order of the High Court, it stands to follow a cautionary approach. This being so, as a court of appeal may have a different view on whether the cost award was just and equitable. "*However, it shall be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion.*"⁸

[31] Having regard to the nature of the matter and specifically that set out above, I am not persuaded that another court will find that this court erred in ruling on costs as it did. The attorney-client cost order in the circumstances of this case

⁵ **Ferreira v Levin and Others; Vryenhoek and Others v Powell N.O. and Others** 1996 (2) SA 621 (CC)

⁶ **Khumalo and Another v Twin City Developers (Pty) Ltd and Others** [2017] ZASCA 143

⁷ 2018 (1) SA 369 (CC)

⁸ 2018 (1) SA 369 (CC) at par [28]

was within the boundaries of this court's discretion and justified by the applicants conduct and findings made.

[32] It was argued that there is no evidence that Brits acted *mala fide* or unlawful in resigning as director of the various companies, and that Brits was mindful of the Roelofse order and therefore divested himself of all connections to all the entities referred to by AQS. Considering the evidence before court, it only begs one question: Why, if Brits never competed with AQS, nor intended to do so, and considered himself bound by the Roelofse order, would Brits divest himself from the various directorships? It makes no sense. The explanation that Brits was mindful of the Roelofse order and that is the reason why he distanced himself, is simply not plausible.

[33] It is argued that this court erred in finding that Brits attempted to conceal his involvement and activities in selling pumps like the ones of AQS, in breach of the Roelofse order, as there is no evidence to support such a finding. On a conspectus of the evidence as supplemented by the hearsay evidence, and Brits' entanglement in the web constructed for the purpose of selling the pumps which were purchased, the finding is justifiable.

[34] The finding of this court that the applicants had failed to provide specificity in respect of shareholding is challenged. It is argued that the applicants fully disclosed all their business dealings, including shareholding and directorships of Brits. It appears that the aforesaid contention is misconstrued. The reasons for the judgment fully deal with the fact that Brits failed to produce any documents in substantiation for the allegation in respect of his shareholding. It would not have been cumbersome for the Brits to provide the shareholders register in proving that which he alleges. The issue of the change of directorships and shareholding is central in the matter, and as such it is required of the applicants to fully, effectively and adequately deal with such an allegation.

[35] In the circumstances the applicants have failed to satisfy the requisite test for leave to appeal to be granted.

ORDER

1. The the application for leave to appeal is dismissed with costs.



GREYLING-COETZER AJ

DATE OF HEARING: 7 March 2022

DATE OF JUDGMENT: 27 April 2022

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